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| 10/608,661   | 06/27/2003  | David W. Koenig      | KCC 4948 (K-C 17,907)           | 7070                        |
| 321  | 7590        | 08/15/2007           |                                 |                             |
| SENNIGER POWERS<br>ONE METROPOLITAN SQUARE<br>16TH FLOOR<br>ST LOUIS, MO 63102 |             |                      | EXAMINER<br>HAND, MELANIE JO    |                             |
|  |             |                      | ART UNIT<br>3761                | PAPER NUMBER                |
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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/608,661  
Filing Date: June 27, 2003  
Appellant(s): KOENIG ET AL.

**MAILED**  
**AUG 15 2007**  
**GROUP 3700**

Christopher M. Goff  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed April 23, 2007 appealing from the Office action mailed January 4, 2007.

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**(1) Real Party in Interest**

The real party in interest is Kimberly-Clark Worldwide, Inc.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct. Appellant is advised that the summary of claimed subject matter item in the appeal brief is intended only for "a concise explanation of the subject matter defined in each of the independent claims involved in the appeal" rather than a broad survey of the art. See 37 C.F.R. 41.37(a)(v).

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

|                           |              |         |
|---------------------------|--------------|---------|
| 6,552,171                 | HOWARD ET AL | 04-2003 |
| JP 2001-011496 (Abstract) | SATO         | 01-2001 |

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-5 and 7-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howard et al (U.S. Patent No. 6,552,171).

With respect to **Claims 1,10**: Howard teaches a hydrolyzed jojoba protein solution for use in skin lotions, creams, and sanitizing wipes (Col. 3, lines 4,5,11,12). Howard teaches compositions for hand lotion (Col. 8, Table 6) and hand cream (Col. 9, Table 7) comprising said jojoba protein solution, as well as Yucca extract and green tea extract, which contains catechin, considered here as a broad spectrum antimicrobial. Howard does not explicitly teach a wipe substrate, however since Howard teaches that said solution is intended for use on a sanitizing wipe, it would be obvious to one of ordinary skill in the art to apply said solution to a sanitizing wipe substrate with a reasonable expectation of success.

With respect to **Claims 2,11,20,24**: Howard does not explicitly teach 100% Yucca Schidigera powder, however yucca extract as used in the food and cosmetic industries is widely known to

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be in pure powder form from the Yucca Schidigera plant. Therefore it would be obvious to one of ordinary skill in the art to use 100% Yucca Schidigera powder as is taught implicitly by Howard.

With respect to **Claims 3,4**: Howard teaches that the hand lotion and hand cream solutions comprising the jojoba protein both comprise Yucca extract present in 0.03% by weight (Col. 8, Table 6).

With respect to **Claim 5**: Howard teaches that the hand lotion and hand cream solutions also contain green tea extract (Col. 8, Table 6 and Col. 9, Table 7) whose active ingredient is catechin, which has widely known antioxidant and antimicrobial uses.

With respect to **Claims 7,8**: Howard teaches that the green tea extract is present in both the hand lotion and hand cream solutions in 0.05% by weight (Col. 8, Table 6, Col. 9, Table 7). Therefore the catechin is present in at most 0.05% by weight of the solution.

With respect to **Claim 9**: Howard teaches that the hand lotion and hand cream solutions are also comprised of goldenrod extract, used as an astringent in both solutions (Col. 8, Table 6 and Col. 9, Table 7).

With respect to **Claims 12,13**: Howard teaches that the hand lotion and hand cream solutions comprising the jojoba protein both comprise Yucca extract present in 0.03% by weight (see Col. 8, Table 6).

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With respect to **Claims 14,15**: Howard teaches that the hand lotion and hand cream solutions also contain green tea extract whose active ingredient is catechin, which has widely known antioxidant and antimicrobial uses.

With respect to **Claims 16,17**: Howard teaches that the green tea extract is present in both the hand lotion and hand cream solutions in 0.05% by weight (Col. 8, Table 6 and Col. 9, Table 7) Therefore the catechin is present in at most 0.05% by weight of the solution.

With respect to **Claim 18**: Howard teaches that the hand lotion and hand cream solutions are also comprised of goldenrod extract, used as an astringent in both solutions (Col. 8, Table 6 and Col. 9, Table 7).

With respect to **Claims 19,23**: With respect to the step of contacting the skin with a wet wipe, Howard teaches a jojoba solution (liquid formulation) comprising yucca extract to be used as hand lotion or hand cream. (Col. 9, Table 7) With respect to claim 23, Howard also teaches that said formulation comprises catechin, a natural broad spectrum antimicrobial derived from green tea leaves. Howard does not explicitly teach a wet wipe comprising a wipe substrate. However, since Howard teaches that said solution is intended for use on a sanitizing wipe, it would be obvious to one of ordinary skill in the art to apply said solution to a sanitizing wipe substrate that is capable of reducing the growth rate of Gram negative bacteria and yeast on the surface of the skin while not substantially affecting the growth rate of Gram positive bacteria. Howard also does not explicitly teach contacting the skin with said substrate and said formulation, however, Howard teaches that the solutions are intended for use in application to the surface of a user's skin and that such solutions are intended for use on a sanitizing wipe, therefore it would be

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obvious to one of ordinary skill in the art to contact a user's skin with a wet wipe having a wipe substrate with the liquid formulation taught by Howard disposed thereon, as such formulation is intended for use on a sanitizing wipe and imparts health benefits to the skin.

With respect to **Claims 21,22**: Howard teaches that the hand lotion and hand cream solutions comprising the jojoba protein both comprise Yucca extract present in 0.03% by weight (see Col. 8, Table 6 and Col. 9, Table 7).

With respect to **Claims 25,26**: Howard teaches that the hand lotion and hand cream solutions comprising the jojoba protein both comprise Yucca extract present in 0.03% by weight (see Col. 8, Table 6).

With respect to **Claims 27,28**: Howard teaches that the hand lotion and hand cream solutions also contain green tea extract whose active ingredient is catechin, which has widely known antioxidant and antimicrobial uses. With respect to **Claims 29 and 30**: Howard teaches that the green tea extract is present in both the hand lotion and hand cream solutions in 0.05% by weight (Col. 8, Table 6 and Col. 9, Table 7) Therefore the catechin is present in at most 0.05% by weight of the solution.

With respect to **Claims 29,30**: Howard teaches that the green tea extract is present in both the hand lotion and hand cream solutions in 0.05% by weight (Col. 8, Table 6 and Col. 9, Table 7) Therefore the catechin is present in at most 0.05% by weight of the solution.

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Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Howard et al in view of Sato (Japanese Patent No. 2001011496).

With respect to **Claim 6**: Howard does not teach an antimicrobial that conforms to any of the items in the group set forth in claim 6. Sato teaches a sterilization detergent that is comprised of ethanol (see Abstract). Alcohols are known in the art for their antimicrobial uses, therefore it would be obvious to modify the jojoba protein solution taught by Howard to contain ethanol, as it would impart additional antimicrobial function.

#### **(10) Response to Argument**

Appellant's arguments filed April 23, 2007 have been fully considered but they are not persuasive.

With respect to appellant's arguments regarding the rejection of claims 1-5 and 7-30 over Howard: Appellant argues that Howard does not teach a wet wipe substrate and a liquid formulation comprising a yucca species extract and a broad spectrum antimicrobial. The Office has already conceded that a wet wipe comprising the extract liquid composition is not explicitly taught by Howard, hence the rejection under 35 U.S.C. 103. As stated numerous times throughout the prosecution history, and as can be found in Col. 3, lines 4-13, Howard teaches the following:

"Among the cosmetic products which can benefit from incorporation of the jojoba products of the invention are those selected from the group consisting of shampoos, shampoo conditioners, hair styling gels, hair conditioners, hair reparatives, hair tonics, hair fixatives, hair mousses, bath and shower gels, liquid soaps, moisturizing sprays, makeup, pressed powder formulations, lip products, bath additives, sanitizing wipes, hand sanitizers, premoistened towelettes, skin lotions and creams, shaving creams, and sunscreens. " (emphasis added)



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Howard clearly teaches applying the liquid composition of the instant invention to a sanitizing wipe, which is a wipe substrate having a liquid sanitizing composition applied thereon. Therefore it would absolutely be obvious to one of ordinary skill in the art to modify the composition of Howard by applying the instant liquid composition of the invention to a wet wipe substrate with a reasonable expectation of success. The fact that Howard lists Yucca extract in a table for a hand lotion composition is only further evidence that this composition can be applied to a wet wipe substrate with a reasonable expectation of success. As to appellant's argument that Howard does not teach a liquid formulation, every single item in Tables 6 and 7 referenced by the Office is in liquid form. Appellant is invited to read further in Col. 8, specifically lines 60 and 61, where it is explicitly taught by Howard that the ingredients are combined in a tank along with glycerin (another liquid) and heated to 75 degrees C. It can be easily understood by anyone of ordinary skill in the art from reading the Howard reference that heating these ingredients to this temperature will melt them (i.e. make a liquid formulation) without turning the mixture into a vapor, at which point, the formulation would be completely useless.

Appellant's argument that the yucca and green tea extracts are in another embodiment is also unfounded. These items appear clearly in Tables 6 and 7.

Appellant further argues that there is no suggestion in Howard that combining yucca extract and green tea extract would provide any benefit. This is not found persuasive as the main ingredient in green tea extract, catechin, is a polyphenol, and polyphenols possess antiseptic properties. Thus the green tea extract renders the claimed broad spectrum antimicrobial (as the term is defined in the specification) unpatentable. At this point in the prosecution history, appellant has been advised that the claim is directed to a wet wipe as a whole that reduces gram-negative bacteria, not a particular substance in the liquid composition.

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Therefore it is unclear why appellant continues to make this same argument, as it was and still is insufficient to overcome the rejection of claim 1.

As to appellant's argument that yucca is labeled by Howard as a stimulant and green tea extract an astringent, these facts are immaterial. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. This argument on the part of the Office is further supported by the fact, stated *supra*, that appellant does not claim a yucca species extract or broad spectrum antimicrobial that alone reduces gram negative bacteria, only the wet wipe as a whole.

As to appellant's citation of the same passage cited *supra* from Howard, namely Col. 3, lines 4-13, appellant has either mischaracterized the passage to fit an argument, or just did not read it correctly. Howard stated that these cosmetic products can benefit from the jojoba product of the invention, not the protein by itself. Otherwise, why would Howard disclose, *inter alia*, sixteen tables worth of compositions, containing jojoba protein with other ingredients? The second full paragraph of page 9 of the appeal brief is also unfounded. What else would the phrase "jojoba products of the invention" be referring to other than the at least sixteen different liquid formulations of the invention that contain at least the jojoba protein?

As to appellant's argument that the formulations of Tables 6 and 7 are respectively a hand lotion and moisturizing hand cream, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. Further, the sanitizing wipes taught by Howard would absolutely be used on a person's hands, thus a formulation that is a

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hand lotion or hand cream would certainly be suitable for use with said sanitizing wipes, and it would certainly be obvious to one of ordinary skill in the art to use them in this manner.

Appellants' arguments with regard to independent claim 10 and dependent claims 2-5, 7-9 and 11-18 have been fully considered but are not persuasive as Appellants' arguments depend entirely on Appellants' arguments regarding the rejection of claim 1, which have been addressed *supra*.

As to appellant's arguments regarding claim 19, appellant has not shown sufficient evidence that the wet wipe suggested by Howard does not substantially affect the growth rate of gram positive bacteria. Since Howard teaches or fairly suggests all of the limitations of claim 19, this limitation flows necessarily from the teachings of Howard.

Appellants' arguments with regard to independent claim 23 and dependent claims 20-22 and 24-30 have been fully considered but are not persuasive as Appellants' arguments depend entirely on Appellants' arguments regarding the rejection of claim 19, which have been addressed *supra*.

As to appellant's arguments regarding claims 2, 11, 20 and 24, this argument in its entirety has been addressed *supra* with respect to the rejection of claim 1. The Office action mailed January 4, 2007 is clear on the motivation to modify the composition taught by Howard so as to contain 100% *Yucca schidigera*. Appellant has not responded sufficiently (i.e. has not refuted that *Yucca schidigera* is well-known for its use in cosmetic and food formulations), thus the rejection is maintained.

As to appellant's arguments regarding claims 8, 17 and 30, Howard teaches 0.05% by weight at most because the amount of distilled water is adjustable, as is the amount of preservative. As appellant is no doubt aware, when additional ingredients or additional amounts of existing ingredients are added, this action reduces the weight fractions of all of the

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ingredients present. Thus the teaching 0.05 % by weight by Howard in Tables 6 and 7 is considered hereinto be an upper limit and thus the range overlaps the claimed ranges.

With respect to appellant's arguments regarding the rejection of claim 6 over Howard in view of Sato: Appellant has set forth a basis for arguing that the combination of these references is not valid, however this basis relies solely upon perceived deficiencies of the Howard reference. In response to appellant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Thus the rejection is maintained.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



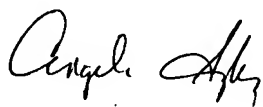
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